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July 12, 2011

Ms. Cynthia T. Brown  
Chief of the Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

RE: Docket No. 42129, *American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. v. Alabama Gulf Coast Railway LLC and RailAmerica, Inc.*

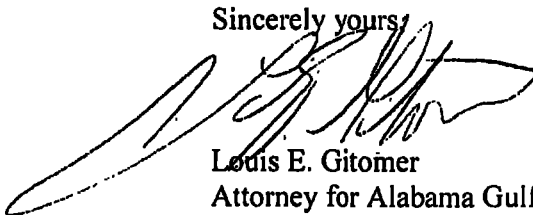
Dear Ms. Brown:

230597

Enclosed for efilings is a Reply to by Alabama Gulf Coast Railway LLC and RailAmerica, Inc. to Arkema, Inc.'s Petition for Leave to Intervene.

Thank you for your assistance. If you have any questions please call or email me.

Sincerely yours,



Louis E. Gitomer  
Attorney for Alabama Gulf Coast Railway  
LLC and RailAmerica, Inc.

Enclosure

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Office of Proceedings

JUL 12 2011

Part of  
Public Record

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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Docket No. 42129

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AMERICAN CHEMISTRY COUNCIL, THE CHLORINE INSTITUTE, INC., THE  
FERTILIZER INSTITUTE, AND PPG INDUSTRIES, INC.

v.

ALABAMA GULF COAST RAILWAY LLC AND RAILAMERICA, INC.

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REPLY TO ARKEMA INC.'S PETITION FOR LEAVE TO INTERVENE

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Dated: July 12, 2011

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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REPLY TO ARKEMA INC.'S PETITION FOR LEAVE TO INTERVENE

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Alabama Gulf Coast Railway LLC ("AGR") and RailAmerica, Inc. ("RailAmerica"), collectively Defendants, oppose Arkema Inc.'s ("Arkema") Petition for Leave to Intervene filed on June 13, 2011 (the "Petition")<sup>1</sup> and respectfully request the Surface Transportation Board (the "Board") to deny the Petition because it will unduly broaden the scope of the proceeding, because Arkema has not provided the information required under 49 C.F.R. §1112.4(b), and because allowing a complaint to be instituted through intervention instead of the complaint process of 49 C.F.R. §1111 is contrary to the Board's rules.<sup>2</sup>

On April 15, 2011 the American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. (collectively "Complainants") filed a complaint

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<sup>1</sup> Defendants were granted an extension of time to file this reply. *American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. v. Alabama Gulf Coast Railway and RailAmerica, Inc.*, Docket No. NOR 42129 (STB served July 7, 2011).

<sup>2</sup> Defendants also note that Arkema has sought intervention under 49 C.F.R. §1113.7, which governs intervention at oral hearings. As demonstrated by the request for a Proposed Discovery and Procedural Schedule jointly filed by Complainants and Defendants on May 20, 2011, an oral hearing is not contemplated in this proceeding. Defendants request the Board to reject the Petition since it was filed under the wrong provision of the Board's rules, or in the alternative, apply the appropriate procedures of 49 C.F.R. §1112.4 and deny intervention.

requesting that the Board determine that the provisions of AGR Tariff 0900 and RA Tariff 1000, Section V, for the handling of Toxic Inhalation Hazards and Poison Inhalation Hazards ("TIH/PIH") cargo are an unreasonable practice and a violation of the railroad's common carrier obligation (the "Complaint").<sup>3</sup> The Complainants also seek a Board order under 49 U.S.C. §721(b)(4) enjoining implementation of what they claim is the "TIH/PIH Standard Operating Practice."<sup>4</sup> AGR and RailAmerica have denied these claims, filed an Answer, and filed a Motion to Dismiss. Complainants have not amended or supplemented their Complaint despite the cancellation of the tariffs that are the basis for the Complaint.

On June 13, 2011, Arkema filed the Petition under 49 C.F.R. §1113.7, which merely stated that Arkema receives chlorine at its plant in Axis, AL, in delivery from AGR, that its position is fully aligned with that of Complainants, and that it "adopts the allegations of the Complaint herein and also adopts requested relief contained in the Complaint." Petition to Intervene at 2.

**Arkema should not be permitted to unduly broaden the scope of this proceeding.** A petition to intervene may not "unduly broaden the issues raised in the proceeding." 49 C.F.R. §1112.4(a)(2). Arkema is clearly seeking to unduly broaden the issues raised in this proceeding, which will include Arkema as a distinct shipper separate from the Complainants, at a new location, and involving a commodity that Arkema may or may not have shipped under AGR

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<sup>3</sup> As of April 29, 2011, AGR canceled AGR Tariff 0900 and canceled its adoption of tariff RA 1000, Section V. AGR published a new tariff AGR Tariff 0900-1 on April 29, 2011. AGR Tariff 0900-1 substantially modifies the now canceled tariffs Complainants cite in the Complaint and clarifies the terms of shipment for TIH/PIH commodities by AGR.

<sup>4</sup> What Complainants call the SOP is really a PowerPoint presentation created by RailAmerica to assist in contract negotiations and it has no force or effect because it has been superseded by the tariffs.

Tariff 0900-1. Rather than file its own complaint, Arkema seeks to piggyback on the Complaint to achieve relief and avoid the fees associated with filing a formal complaint<sup>5</sup>, while at the same time shifting the costs for scientific studies and opinions to justify AGR Tariff 0900-1 to AGR.

Arkema's intervention will unnecessarily complicate this proceeding and unduly broaden the issues since its participation will not be limited. Arkema will seek to develop a complete record as to the reasonableness of AGR Tariff 0900-1 in light of the facts surrounding TIH/PIH service to Arkema by AGR. See *CF Industries, Inc. v. Kaneb Pipe Line Partners, L.P. and Kaneb Pipe Line Operating Partnership, L.P.*, STB Docket No. 42084 (STB served October 13, 2004) slip op. at 2, where the Board granted intervention because it would be limited to addressing the validity of a prescription. Indeed, the Board denies intervention where it will broaden the issues to a dispute, as will Arkema's fact specific claims. *Texas Municipal Power Agency v. The Burlington Northern And Santa Fe Railway Company*, STB Docket No. 42056 (STB Served September 27, 2004) slip op. at 2.

**Arkema has not provided the information required to justify intervention under 49 C.F.R. §1112.4.** Although Arkema has adopted the arguments and allegations presented by the Complainants, it is seeking relief based on its own unique circumstances. Arkema adopts the allegations of the Complainants which are fact specific to PPG, not Arkema. With regard to shipments made to Arkema it does not set out any facts to support its unreasonable practice claim. It does not state that it has shipped under AGR Tariff 0900-1 or that it plans to ship under the tariff. Indeed, Arkema does not even mention AGR Tariff 0900-1 even though it has been in

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<sup>5</sup> The Board has reduced the fee for filing an unreasonable practice complaint to \$350. *Regulations Governing Fees for Services*, Docket No. EP 542 (Sub-No. 18) (STB served July 7, 2011).

effect since April 29, 2011. Simply put, Arkema's claim "does not allege that any of [AGR's] practices or charges are unreasonable or unlawful at this time, nor does it provide information suggesting that [AGR's] service terms will result in unreasonable charges or practices in the future." *South Mississippi Electric Power Association v. Norfolk Southern Railway Company*, STB Docket No. 42128, (STB served April 21, 2011), slip op. at 2 ("*South Mississippi*").

**Permitting Arkema to initiate a complaint through intervention is contrary to the Board's rules.** Under the Board's rules, complaints are to be initiated under 49 C.F.R. Part 1111. The complaint rules require specific information and Arkema's intervention does not meet the "minimal level of detail" required by the Board for a complaint. *South Mississippi* at 3. As permitted by the Board's rules, multiple complainants joined in the Complaint at the time it was filed.

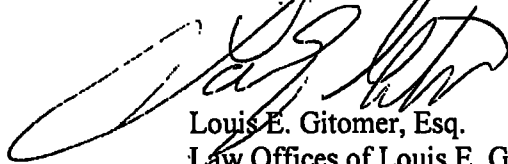
Arkema did not seek joinder under 49 C.F.R. §1111.1(d) because it did not file concurrently with Complainants. When read in accordance with the Board's other rules for the efficient and expeditious administration of a complaint, it is clear that joinder under 49 C.F.R. §1111.1(d) must occur concurrently with the filing of the complaint. Allowing new parties to join a complaint at this late date, would undermine the procedures developed by the Board and would create a continuous burden on the defendant, in this case a Class III railroad, which is dwarfed in size by Arkema, "a €4.4 billion international chemical company." Petition at 1.

**Response to adoption.** Defendants adopt the Answer filed on May 5, 2011 in response to the Complaint as their response to Arkema's adoption of the "allegations of the Complaint... and ... requested relief contained in the Complaint." In addition, Defendants question Arkema's ability to verify the allegations raised in paragraphs 1-4, 7-15, 21, 23 and 24.

## CONCLUSION

For the forgoing reasons, Defendants respectfully request that the Board deny Arkema's petition for leave to intervene.

Respectfully submitted,



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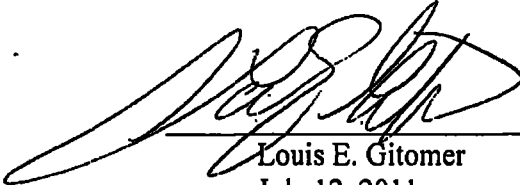
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RAILWAY LLC and RAILAMERICA, INC.

Dated: July 12, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing document to be served upon counsel for American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, Inc., PPG Industries, Inc., and Arkema, Inc. electronically.



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Louis E. Gitomer  
July 12, 2011